No. 10964

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SIVEAR WILLARD LINDSTROM,
Appellant,

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

BRIEF OF APPELLANT

S. J. O'BRIEN,
Attorney for Appellant.

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JURISDICTION

This is a criminal prosecution brought on the indictment of a grand jury in the court below by the United States against appellant for an alleged violation by appellant of certain provisions of the Selective Training and Service Act of Congress of 1940 (Title 50, U.S.C.A., Section 311). The jurisdiction of the district court rests upon Subdivision 2 of Section 24 of the Judicial Code, as amended giving to the court jurisdiction over all crimes and offenses cognizable under the authority of the United States. Jurisdiction of this appeal rests upon Section 128 of the Judicial Code, as amended (Title 28, Section 225 U.S.C.A.).

STATEMENT OF THE CASE

This is an appeal from a judgment of conviction entered upon the verdict of a jury in a criminal prosecution brought by the appellee against appellant for the alleged willful failure of the appellant to present himself for induction into the armed forces of the United States pursuant to the Selective Service Act of 1940 and regulations made thereunder (Title 50 U.S.C.A., Section 311). Appellant was a married man with dependents and for a considerable period of time previous to the month of January, 1944, he had worked as a machinist in the Seattle-Tacoma shipyards, which plant had at all times been engaged in the construction of vessels for the United States and its allies. Previous to this time and at the request of his employer, appellant had received a deferred classification under the Selective Service Act, which deferment was based on the nature of his employment (Tr. page 29). On January 2, 1944, he was classified by his draft board as 1-A. On April 26, 1944, he was ordered to report to the induction station of the government in Tacoma for possible induction into the armed forces (Tr. page 39). He did not so report upon the day designated, and the indictment in this case is based upon the allegation that this action upon his part was knowingly and wilful, and that he continued to wilfully disobey the order up to the date of the indictment. Appellant did not deny receipt of the notice to report and did not deny that he had failed to report on May 13,

1944, the date fixed in the notice. His defense was based upon the contention that he thought in good faith that the order of induction had been stayed pending a further examination of his status, and that his failure to report on the day specified and thereafter, was therefore not willful.

In support of this defense the wife of appellant testified that after the notice of induction was received, but before the time in which appellant was to report, she made a telephone call on one Chester Chastek to discuss the induction order. Chastek was a Commander in the United States Navy who had been assigned by the Navy as liaison officer to the State Direction of Selective Service as an occupational adviser. His duties were to counsel with industry and draft boards on selective service problems (Tr. page 79).

Mrs. Lindstrom, the wife of appellant, testified that on May 10th she had a conversation with Commander Chastek and that she was advised by him that he was going to the shipyards to get appellant deferred, and that that evening she informed her husband of this conversation (Tr. page 46). Appellant testified that he thought that he did not have to report on May 13th "because of the messages that were given to me by my wife and also by statements in the newspapers" (Tr. page 52). It might be observed that the statements in the newspapers apparently referred to a newspaper story which appeared at that time to the effect that men over

twenty-nine would not be drafted, which, if true, would have made appellant immune from draft since he was then thirty-two (Tr. page 46).

Appellant further testified that it was his belief that Commander Chastek was above the local draft board, and that if he had known that the draft board in Puyallup was the one he had to obey he would have reported for induction (Tr. page 53). He further testified that thereafter he received a letter from the F.B.I. regarding his failure to obey the induction order, and that he submitted this letter to his then attorney, Ralph Rogers. He offered to prove that he was advised by his attorney that the attorney would let him know about the matter when he heard from the United States Attorney. This offer, however, was rejected by the court.

Over the objection of appellant, the court received in evidence Plaintiff's Exhibit No. 18 (Tr. page 77), which purported to be a telegram sent to President Roosevelt with the name of appellant thereon. The exhibit purported to be the original document alleged to have been received by the office of the President. It was dated March 7, 1944. After making some reference to the sickness of the wife of the sender and his financial condition, it stated that the sender "will not appear for preinduction as we consider it a trick of the board." When appellant was upon the witness stand this telegram was exhibited to him by the United States Attorney. He stated that he had sent a telegram to the President but not on that date

(Tr. page 60). He stated specifically that "I didn't say in the telegram that I was not going to report on my preinduction physical or that I considered it a trick of the board" (Tr. page 67). At the conclusion of this cross-examination the telegram was offered in evidence and was rejected by the court upon the ground that it was not properly identified (Tr. page 60).

Thereafter one Jean Schonborn, the clerk at appellant's draft board, took the witness stand and stated that this telegram had been received by the local draft board from the state headquarters of the draft board. Over specific and elaborate objection of appellant's counsel the telegram was then received in evidence and read to the jury (Tr. page 76).

SPECIFICATIONS OF ERROR

Appellant makes the following specifications of error:

1. The court erred in refusing the offer of proof referred to in Assignment of Error No. 1 on file herein, which Assignment of Error is found upon Page 20 of the Transcript of Record.

2. The court erred in admitting over the objection of appellant plaintiff's Exhibit No. 18 under the facts and circumstances set forth in appellant's Assignment of Error No. 2, as set forth on Pages 21 and 22 of the Transcript of Record.

ARGUMENT

In presenting our argument, we shall, as permitted by the rules, argue the two assignments of error in inverse order.

The admission in evidence of an alleged telegram from Appellant to President Roosevelt constituted prejudicial error.

This portion of the argument involves appellant's second assignment of error, which is as follows:

> "The Court erred in admitting and receiving in evidence plaintiff's exhibit No. 18. The full substance of the evidence relating to the admission in evidence of said exhibit is as follows: Upon cross examination of appellant, the District Attorney exhibited to the appellant's exhibit 18, which purported to be a copy of a telegram dated March, 1944, from appellant to the President of the United States, which telegram purported to set forth the financial condition of appellant and also stated that the person sending the telegram would not appear for pre-induction as he considered it a trick of the board. Appellant testified that he had sent a telegram to the President relating to this matter but denied that exhibit 18 was a correct copy of the telegram, and specifically denied that he had stated in the telegram that he would not report for pre-induction, or that he considered it a trick of the board. Appellant's counsel objected to the admission of this telegram in evidence upon the ground that it was not properly identified, which objection was sustained by the Court. Thereafter the Clerk of appellant's draft board took the witness stand and testified that the local draft board had received the telegram from state headquarters and that it was a part of the witnesses official files.

> Appellant again objected upon the ground that the exhibit was not properly identified and upon the further ground that it was not the best evidence. This objection was overruled by the Court and the exhibit was received in evidence" (Tr. pp. 21, 22).

As we have shown in our statement of the case, the order of induction, the failure to obey which was the basis of this proceeding, was dated April 26, 1944, and which order notified appellant to report for induction into the Armed Services on May 13, 1944 (Tr. p. 39).

Plaintiff's Exhibit 18 (Tr. pp. 77, 78) purported to be a certain telegram delivered to the office of the President, which telegram was dated March 7, 1944, and had appended thereto the words, "S. W. Lindstrom." Without setting the telegram forth in full, it may be said that, after referring to the financial and family condition of the sender and accusing the draft appeal board of dishonesty, it was stated that the sender "will not appear for pre-induction as we consider it a trick of the board."

Since the only issue in the case was the issue of whether the failure of appellant to report for induction pursuant to the order of the draft board on May 13, 1944, "and continuing to the date of this indictment" was or was not wilful, it seems clear that, if the telegram was not properly admissible, its reception in evidence was highly prejudicial to appellant. Appellant took the position that he believed in good faith that his induction had been

stayed pending an investigation of his case. The telegram upon the other hand purported to be a statement made by the appellant that he would not even appear for a pre-induction physical examination. The effect of the telegram was to contradict the testimony of appellant and is in effect rebuttal testimony. If it was not properly admitted, it cannot therefore be denied that the action of the court below in receiving it in evidence was highly prejudicial.

Appellant contends that the telegram was not admissible (1) because it was not properly identified; (2) because in any event it was immaterial.

As we have shown, no evidence was offered to identify the telegram as a true copy of the telegram sent by either appellant or any other person at the office of the Western Union in Tacoma. Neither was there any evidence offered to show that the telegram was ever received by the President. All that appeared was that the local Puyallup draft board had received the document from the state office of the draft authorities. It seems almost too obvious to require the citation of authorities that, even if it be deemed material, it was inadmissible. A few decisions, however, may be referred to.

The leading Federal decision on the subject is the case of *Drexel v. True*, 74 Fed. Rep., pp. 12-14, decided by the Circuit Court of Appeals of the Eighth Circuit. There, as here, certain telegrams were offered in evidence against the defendants without proof that they had been sent or that they had been re-

ceived. Holding it inadmissible, the court said:

> "The defendants offered in evidence two telegrams, one purporting to be sent by the defendant in error Park Godwin, and the other purporting to be sent by S. Zeimer & Feldstein to Park Godwin. The defendant in error objected to the introduction in evidence of these telegrams, and the court excluded them. Waiving the consideration of other objections to their introduction, it is enough to say the defendants did not lay, or offer to lay, any foundation for their introduction. They did not show, or offer to show, that they were sent by the parties by whom they purported to be sent, or that they were received by the parties to whom they purported to be addressed. No offer was made to authenticate them in any manner whatever, and their genuineness was not admitted. They were, therefore, properly rejected. *Burt v. Railroad Co.*, 31 Minn. 472, 18 N. W. 285, 289; *U. S. v. Babcock*, 3 Dill. 576, Fed. Cas. No. 14,485; *Smith v. Easton*, 54 Md. 138, 145."

So, in the case at bar, the government did not show or offer to show that this telegram was sent by appellant or that it was received by the President.

This case was cited by this court with express approval in the case of *Ford v. U. S.*, 10 Fed. (2d) 339, where this court said:

> "There is no presumption that a telegram is sent by the party who purports to send it. Before it can be received in evidence, there must be some proof connecting it with its alleged author."

While it is true that in that case the court held that the telegram involved was admissible, this was based upon admissions which had been made by the

defendant and which was shown by other evidence. Here there were no such admissions. As we have shown, appellant stated that on some other date he had sent a telegram to the President concerning his draft status, but he specifically denied that he had ever sent a telegram stating that he "was not going to report on my pre-induction physical or that I considered it a trick of the board" (Tr. p. 67).

The fact that appellant had denied sending the telegram was recognized by the court below when, in the course of this ruling, he stated that the appellant "denies a portion of the contents of this particular telegram" (Tr. p. 76).

In Vol. 7, Sec. 2129, p. 465, of *Wigmore on Evidence*, appears a rather original illustration of the rule. Professor Wigmore says:

> "If, as a part of some facts asserted, Doe's letter is offered, what is involved in the assumption of the offer is (a) a letter written (b) by Doe; thus a letter alone, without the fact that it is Doe's, is not receivable, simply because it is not the thing offered. By one of the many rules of evidence, Doe's letter may be admissible; but whatever the particular rule of evidence may be, the element of Doe's connection with the letter is logically assumed in all. * * *"

This is a perfect illustration of Professor Wigmore's statement. The thing that was offered purported to be a telegram which had been written and ordered sent by appellant. There was no evidence, however, to show that the telegram was the

telegram of appellant. Consequently it was not admissible.

The same thought was expressed by the Circuit Court of Appeals of the Eighth Circuit in *Hartzell v. U. S.*, 72 Fed (2d) 569, where the court said:

> "Ordinarily, where a writing is not shown to have been executed by the defendant, it cannot be offered in evidence against him. To be admissible in a criminal case, either to connect the defendant with the commission of the crime, or to procure a verdict against him, a writing must be established with that degree of certainty recognized as necessary to a conviction. *Sprinkle v. United States* (C.C.A. 4), 150 F. 56. A writing, of course does not prove itself, and there is no presumption that a telegram is sent by the party who purports to send it. *McGowan v. Armour* (C.C.A. 8), 248 F. 676; *Drexel v. True* (C.C.A. 8), 74 F. 12; *Ford v. United States* (C.C.A. 9), 10 F. (2d) 339. The government was therefore bound under the established rules of evidence to prove that Hartzell was the person who sent these messages."

See also,

State v. Manos, 149 Wash. 60-65, 270 Pac. 132;
Cobb v. Glenn Boom & Lbr. Co., 49 S. E. 1005;
McGowan v. Armour, 248 Fed. 676;
Consolidated Grocery Co. v. Hammond, 175 Fed. Rep. 641;
Jones on Evidence, Vol. 3, p. 605, note 79;
Montgomery v. U. S., 219 Fed. 162-164.

Indeed, this seems to have been the opinion of the court below at the time the telegram was first offered in evidence. As we have shown, when the appellant was being cross examined by counsel for

the government, the telegram was exhibited to him and he testified as before set forth. On the conclusion of his testimony, the telegram was offered in evidence by the government. The court ruled that it was not admissible, stating:

> "Your identification does not even meet the elementary rules of evidence. The fact that there is a typewritten signature on a typewritten telegram, you have to have some identification on it" (Tr. 50-60).

The district attorney then called the attention of the court to the fact that appellant had admitted that he sent a telegram to the President about this date, to which the court replied:

> "If you desire to further identify it, if you have some one here that received the telegram or accepted the money from him and can verify it as the telegram he sent, or an explanation of the part of the telegram he challenged—I don't know what it is, but anyway, he questioned a portion of it" (Tr. p. 60).

The government did not then again offer the telegram in evidence, for the rather clear reason that there was no identification. Near the conclusion of the trial, however, the witness Jean Schonborn, the clerk of the local draft board which had jurisdiction over appellant, was recalled. All the testimony by this witness as to the document was the following:

> "Q. Showing you Plaintiff's Exhibit 18 for identification, Miss Schonborn, is that part of your draft board file in this case?
>
> "A. Yes, it is.

"Q. And how did you receive it?

"A. We received it through our state headquarters.

"Q. It is a part of your official file?

"A. Yes, it is" (Tr. p. 75).

Thereupon the court overruled proper objections made by appellant's counsel and admitted the document on the theory that the telegram was a part of the official draft files and therefore admissible without any evidence of their authenticity.

It seems clear that, in the absence of a statute, the position taken by the district court was plainly wrong. We have not found any special statute which gives presumptive validity to the files of draft boards who operate under the Selective Service Act. Such documents, the same as private documents, if not authenticated by competent proof, are hearsay and inadmissible. Furthermore, it should be observed that the witness did not testify that the telegram was a portion of the records of the Puyallup draft board in the sense that it was sent to that office, but merely that it was a part of the draft board file which had been originally sent to the local draft board by state headquarters.

Attention is also directed to the fact that, since the telegram was addressed to the President, it clearly appears upon its face that it was not even a part of the original file of state headquarters.

It may possibly be contended that the testimony of the clerk was the equivalent of a written identification and that it was admissible under the provisions of Title 28, U.S.C.A., Sec. 661, which reads as follows:

> "Copies of department records and papers; admissibility. Copies of any books, records, papers, or documents in any of the executive departments authenticated under the seals of such departments, respectively, shall be admitted in evidence equally with the originals thereof."

Certainly there is no help to the government's case arising out of this section. The witness was not authorized to authenticate, either in writing or by oral testimony, any portion of the files of the President in the White House. It is possible that, had the document been otherwise admissible, it might have been authenticated by the President or his secretary. The purpose of authentication is to show that the document is part of the files of the office of the person who authenticates. In so far as the testimony of this witness is concerned, it conclusively appears that she had no knowledge whatsoever as to whether this telegram was ever delivered to the President. The authorities are not numerous, but the few which we have been able to find seem to make it clear that this section only applies to documents which are placed in the files of the authenticating officer pursuant to statute.

A leading case is *U. S. v. Johnson*, 72 Fed. (2d)

614, in which the court, after quoting Sec. 661, *supra*, said:

> "It is clear from the language of this section that it applies only to the books and documents having to do with the official records of departments."

The court further observed:

> "The rule does not apply to documents or papers incidentally lodged in an executive department, and forming no part of the official records required to be kept under governing statutes and regulations."

The same conclusion was reached in *Mohawk Condensed Milk Co. v. U. S.*, 48 Fed. Rep. (2d) 682, by the Court of Claims, where it was held that:

> "This court will not accept certified copies as proof of facts as to the correctness of figures contained in documents certified by an official of the government who has received such documents from some other official, department or commission."

So, in this case, the oral certification of the telegram by the witness was simply a certification of the document which she had received from another office.

In *Rock Island, etc. Co. v. Gournay*, 17 So. (2d) 8, the clerk of a district court attempted to certify as to the contents of certain tax rolls, although not required to keep such rolls. In holding this certification inadmissible, the court said:

> "The clerk of the district court is not charged with the duty of preparing and keeping the tax

rolls, and is therefore not qualified to testify as to their contents and meaning."

So, in this case, the secretary of the Puyallup draft board is not charged with any duty of preserving and keeping telegrams addressed to the President of the United States at Washington, D. C.; and she cannot, therefore, testify that they are a part of the President's records.

In 20 American Jurisprudence, p. 863, the court said:

> "It need not be kept by the officer himself if the entries are made under his direction by a person authorized by him, but it must appear that the keeping of the record or the making of the report is a duty expressly imposed or is one implied from the nature of the official position or duties."

Certainly there is neither an express or implied duty imposed upon the clerk of the Puyallup draft board to keep in the files of that board alleged telegrams sent to the President of the United States.

The court will also find a very elaborate discussion of this subject with reference to Section 661 contained in *Taylor v. State*, 158 S. W. (2d) (Tex.) 881, where the court cited most of the authorities and among other things said:

> "When a document or paper is improperly or incidentally lodged in an executive department and forms no part of the official records authorized or required by law to be kept in that department, the reasonableness of such statutes as a rule of evidence disappears and the provisions

thereof are and of right ought to be inapplicable to any such document or paper."

However, even if it be assumed for the purpose of argument that the telegram was properly identified in so far as the office of the President was concerned, such identification would go no further than to show that such a document was received in the President's office. This would not be any proof that the telegram was sent by the appellant. The authorities previously cited directly establish this, particularly the quotation from the decision of this court in *Ford v. U. S.* (*supra*), where this court said that:

> "There is no presumption that a telegram was sent by the party who purports to send it."

It is also submitted that, even if it be decided that appellant sent the telegram, nevertheless it should not have been received in evidence because the telegram was sent previous to the induction order here involved and had to do with previous transactions with the draft authorities. The case does not involve a conspiracy or a charge of fraud.

Evidence that appellant in March was of the opinion that the draft board was crooked would not be evidence that, subsequent to April 26, he was of the same opinion. We submit that any document of this character, even if properly identified, would have to be subsequent in point of time to the order which is the basis of the indictment.

It is therefore submitted (1) that the telegram was not properly identified as ever having been received by the President; (2) that in any event there was no proof that it was sent by appellant; and (3) that it was incompetent and immaterial.

Evidence of advice of Appellant's counsel previous to indictment should have been received.

This involves Assignment of Error No. 1, which reads as follows:

> "The Court erred in refusing to permit appellant to testify that he laid all the facts and circumstances with relation to his legal duty to respond to an induction notice before his attorney, Ralph M. Rogers, and that he was advised by his said attorney that the matter was in the hands of the United States Attorney and that said attorney would advise the appellant when anything would come up with reference to it. The substance of the evidence rejected in connection with this was substantially as follows: Appellant offered to prove that when he received a notice of reclassification in 1-A, that he consulted with his attorney, Ralph M. Rogers, and that Ralph M. Rogers wrote a letter to a special agent of the Federal Bureau of Investigation, sending copies thereof to the local draft board of appellant and the State head of the selective service, which letter stated the facts with reference to appellant's draft status. Appellant further offered to prove that he received a letter from L. V. Boardman, special agent in charge for the F.B.I., which advised his said attorney that an additional copy of this letter had been sent to the United States Attorney and that further action to be taken by the bureau would be ascertained from the United States Attorney. The

Court denied this offer of proof in the following language: 'I shall deny the offer of proof, except insofar as it deals with the letter from the special agent in charge, if the defendant himself says that he saw the letter, but the letter written by Mr. Rogers detailing the history of the case and the basis upon which deferment was asked would not be competent.' To this ruling the appellant's attorney then inquired what the ruling of the court would be concerning the offer to prove the advice given to appellant by his attorney to the effect that the attorney would let him know when he heard from the United States Attorney. The Court rejected this offer but allowed the letter of the special agent of the F.B.I. to be received in evidence. The grounds urged for the admission of this evidence at the trial were that this evidence went to the question of whether or not appellant wilfully refused to report for induction as required by the notice of induction" (Tr. pp. 20, 21).

The foregoing assignment adequately states the facts involved in this contention and need not be repeated here. The specific evidence relating to this will be found on pages 61 to 66 inclusive of the transcript of record.

As we have shown before, the indictment not only charged the appellant with having knowingly and wilfully refused to obey the order of the draft board to report for induction on May 13, 1944, but also charged that this continued to the date of the indictment, which was filed october 25, 1944.

It appears from the record that in July 1944 a special agent for the F.B.I. wrote a letter to the appellant stating that appellant had been reported

delinquent by the Puyallup draft board, and instructing him to immediately comply with the order of the board (Tr. p. 51). Appellant took this letter to his counsel, Ralph Rogers, who on August 3, 1944, wrote a letter to this F.B.I. agent, which letter was replied to by this agent under date of August 11, 1944 (Defendant's Exhibit A-5, Tr. pp. 67, 68). This letter, after a certain extent reviewing the case, stated that:

> "Further action to be taken by this bureau will thereafter be ascertained from the U. S. Attorney."

Appellant sought to testify that he was informed by his attorney that the matter was in the hands of the United States Attorney and that he, the attorney, would let him know when anything further developed. This offer was by the court rejected (Tr. pp. 62, 64).

We appreciate the fact that ordinarily one charged with a crime cannot, by way of defense, offer testimony that he acted under advice of counsel. Such is not the situation here, however. The letters from the F.B.I. which we have referred to, while not very clear, were at least susceptible of the construction that the whole matter was still under consideration, coming as they did from the branch of the government which was charged with initiating these proceedings. Since the indictment charged a wilful and knowing violation, then, in view of this correspondence which was being carried on between appellant's counsel and the government, evidence that

appellant took no action awaiting further advice from his counsel was evidence that he did not wilfully and knowingly disregard the order of induction. This is peculiarly true, in view of the fact that the jury recommended leniency in its verdict (Tr. p. 4).

For the reasons hereinbefore set forth, it is submitted that the judgment of conviction entered in the court below should be vacated and a new trial ordered,

Respectfully submitted,
S. J. O'BRIEN,
Attorney for Appellant.